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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 443

WILL WILSON, ATTORNEY GENERAL OF THE STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHARLES D. STUART, *et al.*,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Court of the United States and the Honorable Chief Justice and Associate Justice of Said Court:

Comes now the Respondents in the above entitled and numbered case and respectfully present herewith their Brief in Opposition to the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, which Petition was filed herein on the 25th day of September, A. D. 1961.

REPLY TO PETITION

The Respondents will reply to the Petition of the Petitioners by countering the assertions made by the Petitioners.

With reference to the proposition of the Petitioners under *The Question Presented*, Respondents would reply that there are numerous substantial Federal questions in this suit which attacks the constitutionality of Articles 4499-4512, Vernon's Texas Civil Statute, which Articles are referred to as "The Texas Medical Practice Act", and which Articles are set forth in toto in Appendix II of the Petitioners' Petition. As found by the Honorable Court of Appeals a substantial Federal question has been raised in this case which warrants a trial before a Three-Judge District Court. Basically the Respondents-Naturopaths assert that they should not be compelled to obtain an Allopathic "M.D." license as provided for by the Texas Medical Practice Act before they can practice their limited recognized specialty field of the healing art known as Naturopathy, because such requirements in said act whereby the Respondents-Naturopaths, as practitioners of the limited recognized specialty field of Naturopathy, are required to take and pass the examination given for the general Allopathic medical physician and surgeon and obtain an "M.D." license before Respondents can practice as Naturopathic physicians, are unconstitutional and invalid as to the Respondents-Naturopaths within the purview of the *Preamble, Section 2 of Articles IV, and Article VI of the Constitution of the United States of America*, and *Section 1*

of the XIV Amendment thereto, the anti-trust laws and laws against monopolies and combinations in restraint of trade *(Title 15, U. S. C. A., Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26 and 44)* because such requirements are:

1. That an examinatiton must be taken on many subjects not practiced by the Naturopath and in some instances on subjects abhorred by and contrary to the tenets, principles and teachings of the Natutropathic School of Medicine; and in particular, the Naturopath excludes from his practice the following: major surgery, x-ray and radium for therapeutic purposes, and the use of toxic drugs, while the Allopath examination covers these major factors used in the Allopathic system of treatment;

2. That the examination which must be taken and passed is to be given by a board of medical examiners which follows the Allopathic School of Medicine and is not prepared, equipped, nor learned in the Naturopathic School of Medicine, and which board is not authorized to issue a license to practice Naturopathy;

3. An arbitrary interference with the private occupation of Naturopathy under the guise of protecting public interest;

4. An imposition of unusual and unnecessary restrictions upon the lawful occupation of Naturopathy;

5. An arbitrary, unreasonable abridgement of Respondents-Naturopaths citizenship rights and privileges and an invasion of their liberty to engage in the

lawful occupation of Naturopathy in that said requirements are unreasonable, onerous burdens impossible to perform, not fairly applicable and prohibitive because such requirements do not pertain to the limited specialty of the healing art known as Naturopathy;

6. Such that have no reasonable relation to the limited specialty of the healing art known as Naturopathy;

7. Such that have no real or substantial relation to the qualifications required for the practice of the limited specialty of the healing art known as Naturopathy;

8. So unreasonable and extravagant as to interfere with the property and personal rights of Naturopaths, unnecessarily and arbitrarily;

9. An arbitrary and unreasonable attempt to exercise the authority vested in the legislature in the public interest to establish rules and regulations for the practice of the limited specialty of the healing arts known as Naturopathy;

10. Such that have no rational relation to the objective of establishing rules and regulations for the practice of the limited specialty of the healing art known as Naturopathy; and

11. Are creative of a monopoly and formative of a restraint of trade in that such requirements provide for and foster only the Allopathic School of Medicine.

In addition to the foregoing substantial federal questions involved in this law suit, the Respondents submit that a myriad of intermingling questions are presented by the pleadings in this case, as follows:

1. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by the Federal District Court?

2. Does this civil action contain a substantial federal question warranting the exercise of jurisdiction by a Three-Judge District Court?

3. Are facts alleged which entitle the Respondents to relief in this civil action?

4. Does the Federal District Court and or Three-Judge District Court have jurisdiction of this case, because the fundamental rights of the Respondents guaranteed by the Constitution of the United States of America have been violated and are threatened to be violated because the *Texas Medical Practice Act (Articles 4495-4512, Texas Revised Civil Statutes 1925, as amended to date)*, supra, as interpreted and enforced by the Texas Courts and the Petitioners herein, and the acts and conduct of the Petitioners in prosecuting and threatening to prosecute suits against Respondents under color of such Act to enjoin Respondents from practicing their profession of the specialty of Naturopathy under the guise of prohibiting them from practicing the unlimited and all-inclusive practice of medicine or allopathy abridge the Respondents'

privileges and immunities, deprive them of property without due process of law, and deny them the equal protection of the laws, in violation of *Article 4, Section 2*, and *Article 6 of the Constitution of the United States*, and *Section 1 of the 14th Amendment* thereto, and where the injunction sought for by Respondents is provided for under the Civil Rights Acts, *Title 42, U. S. C. A., Sections 1983-1985*?

5. Is Naturopathy a recognized limited healing art whereby the practitioner thereof diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods and who utilizes dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity, and who provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension, abnormalities of tissues, organs, muscles, joints, bones and skin, pressure on nerves, blood vessels, and lmyphatics, and who assists patients in making adjustments of a mental and emotional nature and which limited healing art excludes the use of major surgery, x-ray, and radium for therapeutic purposes, and the use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life, as contradistinguish-

able from the Allopathic (all-inclusive) practice of medicine such as defined in the said Texas Medical Practice Act?

6. Is *Article 16, Section 31 of the Constitution of the State of Texas*, which provides, "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but no preference shall ever be given by law to any schools of medicine" unconstitutional as being repugnant to the Constitution of the United States and Amendments thereto, because the Texas Courts have construed such Texas Constitutional provision as meaning that the Legislature of the State of Texas can require Naturopath physicians to take the same examination as the Allopathic physicians and surgeons to obtain a certificate to practice their profession, when the Allopathic school of medicine is entirely separate and distinct from the Naturopathic school of medicine and when the Naturopathic school of medicine is a limited and special branch of the healing art and when many of the Allopathic practices are repugnant to and abhorred by the Naturopathic school of medicine and when the Texas Courts have further construed said provision of the Texas Constitution to mean that the Naturopath has to be examined on synthetic toxic drugs, major surgery, and the use of x-ray and radium equipment for therapeutic purposes when such practice and subjects are not included within nor embraced by the Naturopathic

school of medicine, and when the interpretation of said provision of the Texas Constitution is meant to mean that the Naturopaths cannot practice their profession whose theories, philsophies and practices have been developed to a high degree of therapeutic efficiency by the Naturopaths persistently maintaining the efficiency of their own philosophy, because to practice Naturopathy in Texas according to said Constitutional provision, the Texas Courts have held that the Naturopathy cannot be examined in his own philosophy and theories of its school of medicine but must turn their backs on their own theories, philosophies, and school of medicine and study and be examined on the theories, philosophies, and school of medicine of the Allopathic physicians and surgeons and where such requirement is arbitrary, discriminatory, and therefore unconstitutional in its operative effect because it violates *Section 1 of the 14th Amendment to the Constitution of the United States of America* which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law"?

7. Is the Naturopathic profession, whose fundamental concept is largely nutritional, i.e. to build, balance, and normalize the human body and whose practitioners place considerable emphasis upon the science of

nutrition and the use of natural foods in their natural states and which profession is not of itself inimical to the health and welfare of the people and whose practitioners are not nuisances per se a lawful profession; and is the right to allow and practice such profession a property right and one of the fundamental rights of citizenship; and is such right to follow and practice the Naturopathic profession, business or occupation, a right protected by the Constitution of the United States within the meaning and intent of the provisions of *Section 1 of the 14th Amendment of the Constitution of the United States of America* which says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law," and is such right included within the constitutitonal guaranty set forth in its preamble to the right of liberty and the pursuit of happiness?

8. Is the Texas State Board of Medical Examiners authorized to issue licenses to the Appellants of the limited field of Naturopathy?

9. Is Naturopathy a nuisance per se?

10. Is the practice of Naturopathy inimical to the health and welfare of the people?

11. Can the Petitioners force the Respondents to qualify as a general physician and surgeon in order to

practice the more limited system of healing known as Naturopathy?

12. Is Naturopathy a recognized lawful field of the healing arts?

13. Do the Petitioners have the authority to prohibit the practice of the limited system of healing known as Naturopathy?

14. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, unconstitutional because it violates *Section 2 of Article 4 of the Constitution of the United States of America* which provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"?

15. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Respondents herein, unconstitutional because it violates *Article 6 of the Constitution of the United States of America* which provides that, "This Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land; and the Judges in every State shall be bound thereby; anything in the Constitution and laws of any State to the contrary notwithstanding"?

16. Is the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, arbitrary and discriminatory and unconstitutional in its operative effect when applied to

the Respondents who are Naturopathic physicians, and is said Texas Medical Practice Act unconstitutional because it violates *Section 1 of the 14th Amendment to the Constitution of the United States* which says that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law"?

17. Is the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, void and unenforceable as class legislation because it violates the "Civil Rights Act" of the United States *(Title 42, U. S. C. A., Section 1983)* in any of the following respects:

a. By arbitrarily requiring Naturopaths to pass examinations in non-naturopathic subjects in order to qualify to practice Naturopathy?

b. By prohibiting the practice of Naturopathy without showing it to be detrimental to the public or inherently harmful?

c. By unfairly discriminating against Naturopaths in the conferring of exclusive jurisdiction and control over these non-allopathic medical practitioners on their allopathic medical competitors?

d. By creating a monopoly by giving allopaths ascedency and control over the limited school of Naturopathy and the power to prevent naturopathic physicians from practicing in violation of the federal statutes pertaining to Monopolies and Re-

straint of Trade *(Title 15, U.S.C.A. Sections 1, 2, 4, 7, 9, 13, 14, 15, 21, 26 and 44)?*

e. By usurping the power of the State to pass on the qualifications of, issue license to, and control of naturopathic physicians?

f. By restricting the rights of the citizens who have faith in and desire treatments by methods not based on the philosophy of that organization (allopathic school) practicing under the Texas Medical Practice Act?

g. By usurping power to suspend a law in violation of *Article 1, Section 28 of the Constitution of the State of Texas?*

18. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, constitute an invalid exercise of the police power in that it bans or prohibits the practice of Naturopathy, a successful recognized harmless system of healing, under the guise of regulating or controlling it?

19. Does the said Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Petitioners herein, arbitrarily interfere with the rights of the Respondents herein by imposing unnecessary restrictions upon their pursuing a lawful trade and occupation, to-wit: the practice of Naturopathy?

20. Does the Texas Medical Practice Act, as interpreted and enforced by the Courts of Texas and the Respondents herein, violate and repudiate the "due process" and "equal protection" guarantees of the Law of the Land?

21. Is that part of *Section 31 of the Constitution of the State of Texas, 1876*, which provides as follows:

> "But no preference shall ever be given by law to any school of medicine."

as interpreted and enforced by the Courts of the State of Texas and the Petitioners herein, void as being contrary to the Constitution of the United States and the Federal Civil Rights Statutes, because among other things the Supreme Court of Texas has held that the aforesaid portion of the Texas Constitution is construed to mean that a Naturopath, who follows a limited and separate school of medicine from the allopathic, allopathic-homeopathic, allopathic-eclectic, and allopathic-osteopathic schools of medicine, must obtain a license from the Texas State Board of Medical Examiners, which Board is composed of followers of allopathic, allopathic-homeopathic, allopathic-eclectic, allopathic-osteopathic schools of medicine, and because such Board examines only in the aforesaid schools of medicine and such Board is not prepared, equipped nor learned in the naturopathic school of medicine, and which Board is not authorized to issue a license to practice Naturopathy?

22. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and Petitioners herein, void as being repugnant to *Section 1 of the 14th Amendment to the Constitution of the United States of America*, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?

23. Does the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of Texas and the Petitioners herein, under the guise of protecting public interests and an alleged exercise of police power, illegally and arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations in violation of said *Section 1 of the 14th Amendment to the Constitution of the United States of America?*

24. Is the aforesaid portion of the Texas Constitution, as interpreted and enforced by the Courts of the State of Texas and the Petitioners herein, unconstitutional in view of said *Section 1 of the 14th Amendment to the Constitution of the United States of America* because said portion of the Texas Constitution is an arbitrary, unreasonable abridgement of Respondents'-citizens' rights and privileges and an invasion of their liberty to engage in lawful business, because of unreasonable requirements, onerous burdens impossible to perform, not fairly applicable, and prohibitive?

25. Is the *Texas Naturopathic Law (Article 4590d)* valid?

26. Assuming that the aforementioned Texas Medical Practice Act and *Section 31 of Article XVI of the Constitution of the State of Texas* are violations of the Constitution and laws of the United States, does such Texas Medical Practice Act and Texas Constitutional provision restrict the Respondents from practicing Na-

turopathy, a lawful occupation, and are the acts and conduct of the Petitioners acting under the color of said Texas Medical Practice Act and the aforesaid portion of the Constitution of the State of Texas in filing suits, prosecuting and threatening to file suits against Respondents to prevent Respondents from following their lawful profession, a violation of the Respondents' Civil Rights as guaranteed to them by the Federal Statutes, and particularly *Title 42, Section 1983, U.S.C.A.* which provides for civil action for deprivation of rights, and which says that, "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"?

27. Are the Respondents entitled to a Temporary and Permanent Injunction against the Petitioners because of the Petitioners' illegal actions in obtaining and intending to obtain injunctions, fines and forfeitures against and imprisonment of Respondents herein, and because the Respondents are now and are threatened to continue to be greatly harmed, damaged, imprisoned and injured by the said illegal, wrongful, knowing and purposeful acts of the Petitioners and because Respondents have no plain, adequate or efficient remedy at law to redress

the said wrongful, knowing and purposeful acts of the Petitioners other than by injunction, and because any other remedies to which they could be remitted would be attended by uncertainties, would involve a multiplicity of suits and would cause the Respondents irreparable harm and injury and occasion undue hardship, vexation and delay, and because such temporary and permanent injunction should be issued because the Respondents will suffer immediate and irreparable injury, harm, damage, imprisonment, forfeitures, and fines?

28. Is medical freedom guaranteed by the Constitutions of the United States of America and the State of Texas and their respective Amendments?

Incidentally in connection with the preceding questions Nos. 9 and 10, permit the Respondents to quote from one of the recognized medical doctors to his opinion concerning the value of the age-old school of Naturopathy. Witness the words of Dr. Ray Lyman Wilbur, M.D., as Chairman of the Council on Medical Education and Hospitals before the Fortieth Annual Congress on Medical Education and Licensure, held in Chicago on February 14, 1944, "New treatments make use of heat, cold, water, electricity, and special manipulations. * * * They bring biological responses more potent than many of the drugs gathered through centuries by trial and error .* * * Medicine based on pills and potions is becoming obsolete. * * * The physiology, with the help of physics, has taught us many ways to deal with the human body that were dreamed of only a decade ago by us, but comparatively

successfully pursued by those of the irregular schools. * * * The medical profession will profit by recognizing this new concept, and must insist that its schools promptly mold their instruction to conform with the new knowledge of body mechanics. * * *." *The Journal of The American Medical Association, March 25, 1944, Vol. 124, pp. 815 and 816.*

The Petitioners propose in *The Question Presented* that the Respondents desire to practice Naturopathy without any regulation of the State of Texas. Nothing could be farther from the truth. The Respondents take the position that Naturopathy can and should be regulated by reasonable regulations. As a matter of fact the State of Texas now has what is known as "The Texas Naturopathy Law" which is *Article 4590d of the Revised Civil Statutes of Texas, 1925, as amended to date;* and such law has been declared unconstiutional by the Texas Courts; but these Respondents would like for such Texas Naturopathy Law to be revised and life breathed into the Texas Naturopathic Law by the holding of the Federal Courts that the Naturopaths do not have to submit to the provisions of the Texas Medical Practice Act before they can practice their lawful profession. The Respondents state that there should be a reasonable regulation of any and all professions and that such regulations is proper; but at the same time the Respondents contend that any such regulation should not be unreasonable or arbitrary to the extent that the necessary compliance therewith would be so ridiculous, unwarranted, unreasonable, onerous, burdensome and non applicable to the profession and so contrary to their principles and tenants and teachings that compliance there-

with is prohibitive and confiscatory and is tantamount to the deprivation to the Respondents of their right to practice their lawful profession. The Respondents state that the aforesaid regulatory Statute known as The Texas Naturopathy Law actually provides for a greater number of hours of college preparation than the regular physician and surgeon (M.D.) or allopathic Act (Texas Medical Practice Act, supra) and these Respondents welcome such regulations.

These Respondents allege that they are Naturopathic Physicians, and as such it can be presumed that they have complied with all requirements to practice Naturopathy, which in the State of Texas is the obtaining of a license under the Basic Science Act and a license through the Texas Naturopathy Board. This suit does not in any way attack the Basic Science Law or the Texas Naturopathic Act; but this suit is leveled at The Texas Medical Practice Act, and the Attorney General of the State of Texas, the Texas Medical Board and the District Attorney of Dallas County, Texas, because of the construction placed on such Act by the highest Court of Texas, and because the Petitioners are taking the position that these Respondents have to comply with the Texas Medical Practice Act and obtain a physicians and surgeons or "M.D." license before they can practice Naturopathy.

As a matter of fact these Respondents would like to point out that the Texas Basic Science Law actually prescribes the Basic Minimum Uniform Standards for a practitioner to practice the healing arts or any branch thereof in Texas; and these Respondents assert that in view thereof the Texas

Medical Practice Act is *not* the law in Texas which establishes the Minimum Uniform Standards for a practitioner to practice the healing arts or any branch thereof in the State of Texas. Permit the Respondents to discuss further the Texas Basic Science Law which is generously quoted in Appendix III of the Petitioners' Petition. As the Honorable Court will note this is *4590c, Vernon's Annotated Revised Civil Statutes of Texas, 1925, as amended to date.* Please note in Section 1 thereof the provision that "No person shall be permitted to take an examination for a license to practice the healing art or any branch thereof, or be granted any such license, unless he has presented to the Board or officer empowered to issue such a license as the applicant seeks, a certificate of proficiency in anatomy, physiology, chemistry, bacteriology, pathology, and hygiene and public health, hereinafter referred to as the basic sciences, issued by the State Board of Examiners in the Basic Sciences." Also note the provision in Section 2 of said Basic Science Law which defines the healing art, to-wit:

> "For the purpose of this Act, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition. * * *"

Thus, this Honorable Court can easily see that the standard basic minimum uniform requirements to practice the healing arts or any branch thereof including Naturopathy is specifically provided for in the aforesaid Basic Science Law and not the Texas Medical Practice Act.

The Respondents would further like to take this opportunity to point out to this Honorable Court that the Texas Legislature has provided several statutes setting forth the requirements, etc., for the issuance of licenses to practice the healing art and its branches. These, by article number *(Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)* are as follows:

Medicine	Articles 4495-4512
Chiropractors	Article 4512b
Nurses	Articles 4513-4528b
Licensed Vocational Nurse	Article 4528c
Pharmacy	Article 4542a & b
Dentistry	Articles 4543-4551d
Dental Hygienists	Article 4551e
Optometry	Articles 4552-4566-1
Chiropody	Articles 4567-4575
Naturopathy	Article 4590d

Further, for the benefit of this Honorable Court, Respondents would like to point out the fact that the Legislature of Texas has recognized the differences and distinction between the healing art and its different branches, and has carefully identified them. At this time please permit the Respondents to quote three sections from the Healing Art Identification Act, *Article 4590e (Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, as amended to date)*:

"Art. 4590e. HEALING ART IDENTIFICATION ACT

"Title

"Section 1. This Act shall be known as the Healing Art Identification Act. The provisions of this Act shall not affect or limit in any way the application or use of

the principles, tenets, or teachings of any established church in the ministration to the sick or suffering by prayer, without the use of any drug or material remedy, provided sanitary and quarantine laws and regulations are complied with; and provided, further, that all those so ministering of offering to minister to the sick or suffering by prayer shall refrain from maintaining offices, except for the purpose of exercising the principles, tenets, or teachings of the church of which they are bona fide members.

"The Healing Art Defined

"Sec. 2. For the purpose of this Art, the healing art includes any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.

"Healing Art Identifications

"Sec. 3. Every person licensed to practice the healing art heretofore or hereafter by either the Texas State Board of Medical Examiners, the State Board of Dental Examiners, the Texas Board of Chiropractic Examiners, the Texas State Board of Examiners in Optometry, the State Board of Naturopathic Examiners shall in the professional use of his name or any sign, pamphlet, stationery, letterhead, signature, or on any other such means of professional identification, written or printed, designate in the manner set forth in this Act the system of the healing art which is by his license permitted to practice. The following are the legally required identifications, one of which must be used by practitioners of the healing art:

"(1) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Medicine: physician and or surgeon, M.D.: doctor, M.D.: doctor of medicine, M.D.

"(2) If licensed by the Texas State Board of Medical Examiners on the basis of the degree Doctor of Osteopathy; physician and/or Surgeon, D.O.; Osteopathic physician and/or Surgeon; doctor, D.O.; doctor of osteopath; osteopath; D.O.

"(3) If licensed by the State Board of Dental Examiners: dentist; doctor, D.D.S.; doctor of dental surgery; D.D.S. doctor of dental medicine, D.M.D.

"(4) If licensed by the Texas Board of Chiropractic Examiners: chiropractor; doctor, D.C.; doctor of Chiropractic; D.C.

"(5) If licensed by the Texas State Board of Examiners in Optometry: optometrist; doctor, optometrist; doctor of optometry; O.D.

"(6) If licensed by the State Board of Chiropody Examiners: chiropodist; doctor, D.S.C.; doctor of surgical chiropody; D.S.C.

"(7) If licensed by the State Board of Naturopathic Examiners: naturopathic physician; physician, N.D.; doctor of naturopathy; N.D.; doctor, N.D."

Therefore, this Honorable Court can easily see that there are various standards, qualifications and identities for the various fields of the healing arts and its branches which are separate and apart from the basic minimum uniform standard requirements set forth for all the practitioners of the healing art and branches thereof. In other words, different standards and qualifications are recognized and apply to different fields of the healing arts and its branches; that is, certain requirements apply to one field that would not apply to others, and vice versa.

The Respondents respectfully suggest to this Honorable Court that inasmuch as Texas now has the Basic Minimum

Uniform Standards law (Basic Science Law) for all who are going to practice the healing art, or any branch thereof, that such Basic Science Law abrogates any effect whatsoever of the holding in the *Collins v. Texas* case, *223 U. S. 288 (1912)*, cited by the Petitioners in support of their proposition that the Texas Medical Practice Act is a reasonable regulation setting forth the Basic Minimum Uniform Standards which all must comply with before they can practice any branch of the healing art.

In reply to the next proposition of the Petitioners that the case of *Wilson v. State Board of Naturopathic Examiners, Civil App., 298 S. W. 2d 946, Writ of error refused, no reversible error, Supreme Court of Texas; Certiorari denied, 355 U. S. 870, rehearing denied, 355 U. S. 920*, and the case of *Schlichting v. Texas State Board of Medical Examiners, 158 Tex. 279, 310 S. W. 2d 557*, are definitive of the issues involved in this case. We submit that the *Wilson* case, supra, does not bring up the question of the unconstitutionality of the Texas Medical Practice Act, supra, insofar as the *Constitution of the United States* and the *14th Amendment* thereto are concerned, nor was the Federal Civil Rights Act involved. The *Schlichting* case, supra, was not taken to the Federal Court. Hence there was the necessity for the Honorable Court of Appeals to hold that there are substantial federal questions involved in the case at bar which need to be presented to a Three-Judge Federal District Court.

Inasmuch as the Petition for Writ of Certiorari mentions the *Wilson* case, supra, the Respondents would like to point

out some of the errors in that case to this Honorable Court. These Respondents submit that the *Wilson* case erroneously declared the *Texas Naturopathic Act (Article 4590d)* unconstitutional insofar as the Texas Constitution is concerned. The *Wilson* case admits that the practice of naturopathy is limited to certain means and excludes specific means (pp. 947, 948); it also states that the differences between the requirements of the regular Medical Practice (allopathic) Act and those of the Naturopathic Act are apparent and substantial (p. 950). Yet such case holds that Naturopaths must take the same examination as the regular physicians and surgeons (allopaths). Is this holding a preference in favor of the allopathic? The Respondents earnestly avouch that it is. Such holding discriminates against the naturopath, and makes a preference in favor of the allopaths, all of which is actually contrary to the provisions of the *Texas Constitution (Article XVI, Section 31)* which prescribes that "No preference shall ever be given by law to any school of medicine", and likewise such requirement is violative of the *XIV Amendment to the Constitution of the United States* which will be discussed later on in this Brief. Therefore in the opinion of the Respondents the Texas Naturopathic Act is actually constitutional rather than unconstitutional.

An Allopath is today's general medical doctor and surgeon who treats disease by any system or method (See *Words and Phrases, Permanent Addition, Vol. 3, Page 338; Bradbury v. Bardin, 34 Conn. 452, 453; The Winston Dictionary, The John C. Winston Company, Copyright 1957;*

Chambers Twentieth Century Dictionary, The New Mid-Century Version, edited by William Geddie, M.A.B. Sc. W & R Chambers, Ltd., Thistle Street, Edinburg, 6 Dean Street, London W, 1). While a Naturopath is limited to the system of treatment which is encompassed within the definition of a naturopathic doctor, whose occupation is defined in the Dictionary of Occupational Titles, U. S. Department of Labor, as follows:

> "DOCTOR, NATUROPATHIC (Medical Ser.) 0-52.21. naturopath. A HEALER. Diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that employs physical, mechanical, chemical, and psychological methods: Utilize dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity. Provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension; abnormalities of tissues, organs, muscles, joints, bones, and skin; pressure on nerves, blood vessels, and lymphatics; and assists patients in making adjustments of a mental and emotional nature. Naturopathy excludes the use of major surgery, x-ray and radium for therapeutic purposes, and use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life."

This Honorable Court will note that the Texas Medical Practice Act, Article 4510, is a law pertaining to the Allopaths who treat disease and disorders by any system or method; and this Honorable Court will further notice that to practice allopathy in the State of Texas under said Texas

Medical Practice Act that the applicant for a license under said Act has to be examined on general medical subjects and surgery which are practiced by the Allopaths or regular M.D. doctors as prescribed in Article 4503 of said Act. The Naturopaths, according to their tenets and teachings, and the philosophy of their limited branch of the healing art, do not practice the general field of medicine and surgery, but rather use the natural means of treatment by determining the cause of a patient's discomfort or illness or disease and removing such cause by natural restorative means to return the human body back to its normal balance and functions, thus eliminating the discomfort, illness or disease in the patient. It is also worthy of mention that a Naturopath does not treat communicable, quarantinable, acute, infectious maladies or diseases, such as smallpox, diphtheria, typhoid, scarlet fever, gonorrhea, syphilis, measles, mumps, whooping cough, etc. Of foremost importance, however, is the fact that the Naturopath does not study nor use surgery, toxic drugs, or x-ray for therapeutic purposes, and actually he does not champion the use of such methods to restore a person to good health; and some of the methods of treatment utilized by an Allopath (M.D.) are actually repugnant to and contrary to the tenets, teachings, philisophies and methods of treatment used by the Naturopaths, and many times the Naturopath has to step in and restore a human body to good health by natural treatment after an Allopath (M.D.) has exhausted all his remedies to cure a patient. It is, therefore, fundamental that to require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for general physicians

and surgeons would be a unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition; and this right to follow a recognized occupation is a right protected by the constitutional guaranties of liberty as set forth in the Fourteenth Amendment to the Constitution of the United States; and, therefore, these Respondents fervently appeal to this Honorable Court to refuse to review the opinion of the Honorable Court of Appeals because these Respondents do have a substantial federal question involved in this case which they are entitled to present to a Three-Judge District Court and to seek a judgment holding that insofar as the Texas Medical Practice Act, supra, affects the practice of naturopathy, the act is unconstitutional and void; and that so far as said act affects allopathy or the general practice of medicine and surgery it is valid. See *State of Idaho ex rel., State Board of Medicine of the State of Idaho, S. M. Poindexter v. David Smith (Supreme Court of Idaho, April 8, 1959), 337 Pacific 2d 938-942.* This latter case is so directly in point that the pertinent portions thereof are quoted and set forth in Appendix I of this Brief; and the attention of the Honorable Justices of this Court is invited to this Appendix because such opinion is squarely in consonance with the principles averred by the Respondents herein.

These Respondents further appeal to this Honorable Court to recognize their constitutional rights and respectfully suggest to this Honorable Court that the decision of the Honorable Court of Appeals in this case should not be

reviewed by this Honorable Court because of the holding of this Honorable Court and the said Honorable Court of Appeals in the case of *England et al. v. Louisiana State Board of Medical Examiners et al. (Fifth Circuit—September 9, 1958), 259 F.2d 626 (Fifth Circuit on rehearing—January 23, 1959), 263 F. 2d 661 (Supreme Court—June 1, 1959), 359 U. S. 1012, 3 L. Ed. 2d 1036, 79 S. Ct. 1149.* In this latter case this Honorable Court holds that the state may regulate, within reasonable bounds, a recognized useful, limited system of the healing art, but it cannot prescribe such arbitrary and unreasonable requirements which will contravene the Constitution and laws of the United States and amount to a denial of due process or of equal protection of the laws under the Fourteenth Amendment. This latter case is a Chiropractor case, which involves a limited non-surgical practice of medicine such as a Naturopath; and this Honorable Court and the Honorable Court of Appeals holds that the practitioners of such limited system of the healing art have a right to come to Court and show whether or not the requirement of a state statute whereby such practitioners are required to be examined upon the general subjects, including surgery, which are required for an Allopathic physician and surgeon to pass and obtain a license, amounts to a denial of their rights to follow a lawful occupation which is guaranteed to them under the Fourteenth Amendment to the Constitution of the United State... This is all that the Respondents seek, that is, their day in Court to prove their rights.

There is not a more substantial federal question than the question which involves the freedoms and liberties of the people of the United States, because this is the very precept upon which this country was founded and upon which the Constitution of the United States and its amendments are based.

Why should the entire field of the healing art be given over to the Allopaths?

The opinions of the majority of the Court in the *England* case, supra, are masterpieces. The illuminating, sagacious and fundamental statements contained in the foregoing opinions marks the first time that a Court has undertaken to understand and develop the true meaning and need for medical freedom. These opinions herald a return of medical freedom and a wresting of the healing art from the monopolistic grip thereon that the Allopaths have stealthily gained. The Allopaths have so dominated and controlled the healing art that the modern generation knows of practically no medical treatment other than by drugs or surgery; sight has nearly been lost by today's generation of the highly successful cures of illness by the restoration of the human body to natural health by treatment by natural means as practiced by the Naturopaths. The Naturopaths whose philosophy is to treat the cause of illness by natural methods to put the human body back in balance and thus eliminate or prevent the illness is an age-old philosophy of medicine that should be preserved, and it should not be allowed to be strangled and destroyed by the Petitioners. The aforesaid opinions in the *England* case,

supra, are like the rising of the sun on a new day for the natural health and happiness of the people of our nation.

These Respondents are entitled to the protection of their liberties and freedom and rights to pursue their lawful profession as guaranteed to them by the Constitution of the United States and its amendments and they are entitled to have their injunction against the Attorney General of the State of Texas, the Texas Medical Board and the District Attorney of Dallas County, Texas, from interfering with these liberties, freedoms and rights and the action of the Court of Appeals in reversing the judgment of the District Court and remanding the case for a trial before a Three-Judge District Court is proper in order that these most substantial federal questions which are involved in this case can receive full consideration and so that the Three-Judge District Court can render a proper decision on this very vital subject which has nation-wide interest and which affects the health and welfare of so many people throughout our Country. These Respondents truly believe that the decision of the Court of Appeals is correct and that this Honorable Court need not grant its Writ of Certiorari because these Respondents are entitled to have their day in Court so that they will be able to duly show and prove to the satisfaction of a Three-Judge District Court that their liberty, freedom and rights are in jeopardy, and which liberty, freedom and rights are guaranteed and protected by the United States Constitution, particularly the *Preamble, Section 2 of Article IV, Article VI,* and *Section 1 of the Fourteenth Amendment* to such Constitution together with the anti-trust laws of the United

States. And further, these Respondents enunciate that if *Section 31 of Article 16 of the Constitution of the State of Texas* as construed by the Supreme Court of Texas denies these Respondents their aforesaid rights, then the Three-Judge District Court should declare that portion of the Constitution of the State of Texas unconstitutional.

These Respondents suggest to this Court that a Three-Judge District Court could not consider more substantial Federal questions than the ones involved in this case.

WHEREFORE, these Respondents pray that because of the matters and grounds set forth in the foregoing Brief that the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 11, 1961 should not be reviewed by this Court.

Respectfully submitted,

JAMES L. MCNEES, JR.,
407 Davis Building,
1309 Main Street,
Dallas, Texas,
Counsel for Respondents.

PROOF OF SERVICE

I, JAMES L. McNEES, JR., the Counsel for the Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the day of October, A.D. 1961, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Petitioners by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Leon F. Pesek, Esquire, the Counsel of record for Petitioners, with such envelope addressed to Honorable Leon F. Pesek, Assistant Attorney General of Texas, Capitol Station, Austin, Texas.

JAMES L. McNEES, JR.

APPENDIX I

No. 8737

STATE OF IDAHO *ex rel.*, STATE BOARD OF MEDICINE of the State of Idaho, S. M. Poindexter, Chairman,
Plaintiff-Appellant,

v.

DAVID SMITH,
Defendant-Respondent.

Supreme Court of Idaho.
April 8, 1959.

Action by state to enjoin defendant from advertising himself as naturopathy doctor on ground that he was not licensed to engage in practice of medicine and surgery or other healing art. The District Court, Ada County, Doran H. Sutphen, J., sustained defendant's demurrer, and state appealed. The Supreme Court, Bellwood, J., held that complaint did not state facts sufficient to constitute cause of action.

Affirmed.

* * * * *

On February 21, 1955, appellant filed its Second Amended Complaint in which it is alleged, among other things:

"II

"That Defendant, David Smith, is a resident of Ada County, State of Idaho, and that he is not now, and never has been, the holder of a license to practice medicine and surgery in the State of Idaho and is not now and never has been the holder of a license to practice any of the healing arts in the State of Idaho.

"III

"That Defendant presently advertises, in the manner alleged in Paragraph VI of this Second Amended Complaint, in Ada County, State of Idaho, as one being willing and able to investigate and diagnose both real and imagined mental and physical ailments of the human body, of the types commonly investigated and diagnosed by practicing naturopathic doctors in Idaho, with the view of relieving the same.

"IV

"That Defendant presently advertises in Ada County, State of Idaho, as one being willing and able to treat both real and imagined mental and physical ailments of the human body, with the view of relieving the same by methods commonly employed by practicing naturopathic doctors in Idaho.

"V

"That naturopathic doctors in Idaho, in treating real and imagined mental and physical ailments of the human body with the view of relieving the same, commonly employ physical culture and drugless treatment of disease (other than surgery) by all known methods supposed to stimulate or assist nature, as for example, by the use of light, air, water, heat, rest, diet, herbs and massage.

"VI

"That Defendant advertises himself as a practicing naturopathic doctor, as alleged in Paragraphs III, IV and V of this Second Amended Complaint, by maintaining a sign on the door of a building located at 6102 Fairview Avenue near the northwesterly boundary of Boise City, Ada County, Idaho, said sign reading as follows:

" 'David W. Smith, N.D.
Hours by Appointment
Entrance'

"and causing to be maintained in the current (Fall) edition of the Boise Telephone Directory of the Mountain States Telephone and Telegraph Company the following entries:

" 'Smith David W. natrpthc phys
6112 Fairview av—4-3681'
(page 63 of the Directory)

and

" 'Naturopathic physicians
* * * * *
Smith David W. 6112
Fairview av—4-3681'
(page 91 of the Directory)

"VII

"That Defendant threatens to continue to advertise in the manner set forth in Paragraphs III, IV, V and VI of this Second Amended Complaint.

"VIII

"That, unless restrained and enjoined from so doing, the continuation of the acts mentioned in Paragraphs III, IV, V, VI and VII of this Second Amended Complaint would endanger the public health, safety and welfare in Ada County, Idaho."

By the second amended complaint the appellant seeks (1) an adjudication that the acts of the respondent thus alleged constitute the practice of medicine and surgery or the practice of one or more of the other healing arts for which the State of Idaho requires licenses, and (2) a permanent injunction restraining the respondent from advertising as thus alleged.

On February 25, 1955, respondent filed a two-part demurrer to the second amended complaint (1) that it does not state facts sufficient to constitute a cause of action against

respondent, and (2) that it is ambiguous, unintelligible and uncertain in enumerated particulars; and a motion to strike therefrom paragraphs III, IV, V, VI, VII and VIII.

On June 11, 1957, the district court sustained "said demurrer" * * * "without leave to plaintiff (appellant) to amend" and granted the motion to strike as regards paragraphs III, IV, VI, VII and VIII. There followed the district court's judgment of dismissal of the second amended complaint and the action based thereon, from which this appeal is taken. Among other charges of error, appellant urges that the district court erred in sustaining the demurrer and not overruling the same.

Chapter 18, Title 54, I.C., regulates the practice of medicine and surgery. Section 54-1802, I.C., provides in pertinent part as follows:

> "(a) Any person shall be regarded as practicing medicine and surgery who shall advertise in any manner, or hold himself or herself out to the public, as a physician and surgeon, or either, or who shall investigate, diagnose or treat, or offer to investigate, diagnose or treat, any physical or mental ailment or disease, real or imagined, of any person with a view to relieving the same, as is commonly done by physicians and surgeons, or suggest, recommend, prescribe or direct for the use of any person, sick, injured or deformed, any drug, medicine, means or appliance for the intended relief, palliation or cure of the same, or who shall suggest, recommend, prescribe or direct an operation on any such sick, injured or deformed person or who shall perform, or offer to perform, any such operation whether or not such person receives therefor, either directly or indirectly, any fee, gift or compensation of any kind whatsoever or in any manner whatsoever: Provided, however, that the

> definition of the practice of medicine and surgery as defined above shall not be construed to include the practice by any person of a healing art which is a system or mode of treating the sick or afflicted which is, or may hereafter be, licensed under the laws of this state if the person practicing such healing art holds a license from the state entitling him to engage in the practice of such healing art, including licensed pharmacists while engaged in the practice of their profession; and provided further, that the provisions of this act shall never be construed to affect in any manner the practice of the religious tenets of any church or religious belief. * * *"

Section 54-1803, I.C., makes it unlawful to practice medicine and surgery without a license, and Section 54-1815, I.C., authorizes injunctions to restrain violations.

Chapters 7 and 16 of Title 54, I.C., regulate chiropractic and osteopathy, respectively.

Naturopathy is not expressly regulated or licensed by the Idaho Code.

Appellant contends that the practice of medicine and surgery (Sec. 54-1802, supra) includes every aspect of each and every branch of the entire healing art except those separately licensed; that insofar as the practice of chiropractic or osteopathy covers naturopathy, the latter, to the extent covered, can be practiced only by the holder of a license in the covering field of healing; that insofar as naturopathy is not thus covered by such practices, it is covered by the all-inclusive field of medicine and surgery, and thus, to that extent requires a license in medicine and surgery; and finally, that Chapter 18 of Title 54, I.C., as it thus regulates or relates

to naturopathy, is a constitutional exercise of the police powers in its requirement that practicing naturopaths must hold a license in a healing art.

With appellant's contentions we cannot agree. Principles applicable here, and controlling, have appeared heretofore in this Court's decisions.

[1] The substance of the second amended complaint is that the respondent is holding himself out as a naturopathic doctor or physician and that he is threatening and advertising that he is engaging and will continue to engage in the practice of naturopathy. While it is primarily a legislative prerogative to determine what constitutes permissible practice of naturopathy or define what naturopathy is, it would not be admiss to examine the same. Webster's New International Dictionary, 2nd Ed., provides the following definitions:

> Naturopathy: (L. *natura*, nature + pathy) a system of physical culture and drugless treatment of disease by methods supposed to simulate or assist nature.
>
> Pathy : A system of treating disease.

The American Illustrated Medical Dictionary, 22nd Ed., provides the following definition:

> Naturopathy: A drugless system of therapy by the use of physical forces, such as air, light, water, heat, massage, etc.

The legislature, by Section 54-1802, supra, has defined the practice of medicine and surgery.

By Section 54-712, I.C., the legislature has defined the practice of chiropractic as follows:

> "Any licentiate under this chapter may adjust any displaced segment of the vertebral column or any displaced tissue of any kind or nature, for the purpose of removing occlusion of nerve stimulus in the bodies of human beings, and practice physiotherapy, electrotheraphy, hydrotheraphy, as taught in chiropractic schools and colleges, but nothing herein contained shall allow any licentiate to prescribe medicine, perform surgical operations or practice obstetrics."

While the legislature has provided regulatory measures for the practice of osteopathy, it has not defined the same. But in State v. Sawyer, 36 Idaho 814, 214 P. 222, among several definitions we find the following:

> "Osteopathy * * * is a system of treating diseases of the human body without drugs and by means of manipulation."

[2] From these definitions of the practices of medicine and surgery, chiropractic and osteopathy, it must be evident that the calling or profession of one differs materially from the calling or profession of the others; that the system of healing employed by the naturopath has little in common with that employed by the physician and surgeon, the chiropractor or the osteopath; and that while the physician and surgeon is authorized to treat the sick and afflicted by any and all methods and means, the naturopath, the chiropractor and the osteopath are limited in their treatments to their particular systems. Naturopathy may not be as generally

known as the three branches of the healing art just referred to, but it has been and is recognized as a separate and distinct system of the healing art.

[3] No persuasive reason has been assigned, nor is one indicated for departing from the principles pronounced in State v. Armstrong, 38 Idaho 493, 225 P. 491, 33 A.L.R. 835, and State v. Fite, 29 Idaho 463, 159 P. 1183. Whether the question occupation be chiropody, as in the Armstrong case, or naturopathy, as in this case, the principles are equally applicable. The right to follow a recognized occupation is a right protected by the constitutional guarantees of liberty. Fourteenth Amendment to the Federal Constitution; Idaho Constitution, Art. 1, Sec. 13; Berry v. Summers, 76 Idaho 446, 283 P. 2d 1093.

[4-6] A calling may not be prohibited unless it is inherently injurious to the public health, safety or morals, or unless it has a tendency in that direction. State v. Armstrong, supra. Here the respondent is not in anywise holding himself in the capacity of a physician or surgeon, a chiropractor, or an osteopath; he holds himself out as a practitioner of the recognized branch of the healing are designated naturopathy. If the naturopath is limited in his practice to the use of a system of physical culture and drugless treatment by methods supposed to stimulate or assist nature, or to the use of physical forces such as air, light, water, heat, massage, and other similar simple matria medica, the system cannot be inherently injurious or have a tendency in that direction. Nothing is indicated which would justify prohibit-

ing naturopathy. And appellant disclaims any such intention on the part of the legislature. Naturopathy does bear some relation to the public health, and there can be no question but that the legislature has power to regulate all callings related to the public health. The contention is that naturopathy is regulated by Chapter 18 of Title 54, I.C., by requiring that a naturopath obtain one of the different sorts of licenses provided by law such as that for a physician and surgeon, a chiropractor, or an osteopath.

[7, 8] To require one desiring to engage in the practice of naturopathy to meet the requirements prescribed for physicians and surgeons would be an unreasonable regulation of a recognized calling, unnecessary for the public's protection. It would in most, if not all, instances amount to prohibition. So far as Section 58-1802, I.C., affects the practice of naturopathy, the act is unconstitutional and void. So far as it affects the branches of the healing art licensed by the statutes and all callings or practices sufficiently related to fall within them, it is valid.

[9] We adhere to and approve in this case the principles announced in the Armstrong and Fite cases above cited, and conclude that the respondent's demurrer was correctly sustained below. By virtue of the foregoing, it is unnecessary to consider the lower court's ruling on respondent's motion to strike; even so, the ultimate result would remain unaffected.

The judgment of dismissal of appellant's second amended complaint is affirmed.

Costs to respondent, I.C. Sections 54-1809, 54-1815; Snake River Mutual Fire Insurance Co. v. Neill, Idaho, 336 P. 2d 107.

TAYLOR, SMITH, KNUDSON and McQUADE, JJ., concur.

PORTER, C. J., not participating.